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No. _____

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1993

SUSAN R. M. BY HER NEXT FRIEND,
CHARLES L. M.,

Petitioner Pro Se,

vs.

NORTHEAST INDEPENDENT SCHOOL DISTRICT,
A SUB-DIVISION OF THE
TEXAS EDUCATION AGENCY,

Respondents.

Petition For Writ Of Certiorari
To The United States Court
Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a U.S. Court of Appeals Fifth Circuit decision which conflicts with U.S. supreme court decisions for the difference between a loss of standing and standing to sue, a refusal to furnish equitable relief, a refusal to apply special rules when application of state laws frustrate the operation of federal programs and an exception for a State to claim Eleventh Amendment sovereign immunity will be allowed to stand.

2. Whether a U.S. Court of appeals Fifth Circuit decision which conflicts with other U.S. Courts of Appeal decisions for the date when a state statute of limitations commences for a legal action filed on behalf of a minor and written consent is not required from all parties to refer pre-trial matters to the magistrate judge will be allowed to stand.

LIST OF ALL PARTIES

Plaintiff-Appellant

Susan R. M., by her next friend, Charles L. M.

Defendants-Appellees

Northeast I.S.D., a sub-division of the Central Education Agency of the State of Texas, known as the Texas Education Agency.

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No. _____

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SUSAN R.M. BY HER NEXT FRIEND,
CHARLES L. M.,

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vs.

NORTHEAST INDEPENDENT SCHOOL DISTRICT,
A SUB-DIVISION OF THE
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Respondents.

Petition For Writ Of Certiorari
To The United States Court
Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Charles L. M., Petitioner Pro Se, petitions for Writ of Certiorari to review the Fifth Circuit decision of June 4, 1992 which Affirmed the Trial Court Order of dismissal dated April 2, 1992 and also the Fifth Circuit's order dated July 15, 1993 which denied the Appellant's Petition for Rehearing.

OPINIONS BELOW

The Trial Court Order of dismissal dated April 2, 1993 was not published. This Trial Court Order is included as Attachment B.

The June 4, 1993 Memorandum opinion of the Fifth Circuit, whose judgment is herein sought to be reviewed, is not reported. This decision and the Fifth Circuit Order which denied the Appellant's Petition for Rehearing are included in Appendix A to this Petition.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on June 4, 1993. The Fifth Circuit denied the Appellant's Petition for Rehearing on July 15, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

The Trial Court's Order of denial dated April 2, 1992 does not specify any statute of jurisdiction. This Trial Court Order of denial dated April 2, 1992 is included at Appendix B to this Petition.

STATEMENT OF THE CASE

The matters which precipitated the filing of a legal action

The Petitioner's daughter Susan R. M. was born on August 18, 1969. Susan started having problems when she was in Kindergarten. The Petitioner's local public school

district, Northeast I.S.D., tested Susan with an educational testing specialist. The Petitioner forced the Northeast I.S.D. to pay for independent testing because of the dispute over the school district's in-house test results. Independent testing was conducted on Susan by Dr. Wallace Bloom, Ph.D., Child Psychologist, on December 16, 1974. Dr. Bloom's test results disclosed that Susan possessed a one year social development lag which is one of the lesser known criterion which comprises the Special Education handicapping condition known as Language Learning Disability. Dr. Bloom recommended that Susan be placed in the Early Childhood Education Program which was operated by the Northeast I.S.D. from Kindergarten through the Fifth Grade.

The Early Childhood Education program did not have a continuation program in Middle School which is grades six through eight. The Northeast I.S.D. attempted to mainstream Susan. The Petitioner ascertained that Susan's educational progress was unsatisfactory and started questioning the suitability of Susan's Special Education placement. The Petitioner requested several Northeast I.S.D. Admission, Review and Dismissal (ARD) committee meetings to consider Susan's educational progress. The Petitioner asked at these Northeast I.S.D. ARD committee meetings if a residential placement at school district expenses should be considered for Susan. The officials of the Northeast I.S.D. at the ARD committee meetings refused to consider a residential school placement for Susan.

Dr. Elizabeth Lende, Northeast I.S.D. Psychologist, administered a test to Susan's parents on October 28, 1982 and concluded that Susan's social development lag was

almost normal. The Petitioner disputed this test results and on November 12, 1982 wrote Northeast I.S.D. and requested independent testing of Susan at school district expense. The Northeast I.S.D. never answered this letter. On May 31, 1983, as the result of this dispute over the test results of Susan the Petitioner made a formal written complaint to the Administrator of the Special Education Programs of the Texas Education Agency, Austin, TX, that the Northeast I.S.D. was not meeting all of his daughter Susan's Special Education needs.

The Texas Education Agency sent an inspection team to investigate the Petitioner's formal written complaint during the last week of June, 1983. This inspection team found many deficiencies which were contained in Susan's Special Education folder. The Texas Education Agency inspection team chief *directed* (emphasis added) the Northeast I.S.D. to pay for independent testing of the Petitioner's daughter Susan.

Susan was tested at the Phoenix Center in San Antonio, TX in July and August, 1983. Two separate test reports were prepared. These test results were as follows:

a. Report of Dr. Douglas Winslow and Dr. Alan Fitzpatrick, Psychologists.

(1) Diagnostic and Statistical Manual of Mental Deficiencies (DSM) Axis I 390.90 Adjustive Disorder with atypical features characterized by manipulative and oppositional behavior.

(2) DSM Axis II 301.22 Schizotypical personality disorder.

The law person language description of these above conditions is severe emotional disorders. The Petitioner submits that his daughter Susan had possessed these conditions for some time but these conditions had not been ascertained or dealt with by Northeast I.S.D. Because of this circumstance the Petitioner's daughter Susan had not achieved satisfactory educational progress.

b. Report of Dr. Edward C. Gooze, Specialty, Communication, Cognitive and Learning Disorders.

(1) Academic lag. The Peabody Individual Achievement Test was administered. Susan had completed the eighth grade. This test result disclosed that Susan possessed a sixth grade academic achievement level.

(2) Minor speech defects.

(3) Muscular physical uncoordination.

The Northeast I.S.D. held an ARD committee meeting on September 14, 1983 to consider the Phoenix Center test results. The ARD committee voted to try mainstreaming Susan at Robert E. Lee High School. If this program did not work, a transfer to Center School, the Northeast I.S.D. alternative school which offered a curriculum for emotionally disturbed students, would be considered. If placement at Center School did not work then residential school placement would then be considered.

Delphina M. M., mother of Susan R. M., died of cancer on November 3, 1983. Mrs. M.'s death aggravated Susan's overall condition. Susan's educational progress at Lee High School became poor because of her mother's death. A Northeast I.S.D. ARD committee meeting was

held in January, 1984. Susan's ARD committee voted to transfer Susan to Center School.

Susan's educational program continued to be poor at Center School. Susan had to attend summer school at Center School in 1984 since she had not completed all of her course requirements for the 1983-1984 school year.

Dr. Steven R. Pliska, M.D., the child psychiatrist who had treated Susan for some time, recommended that Susan should be placed at a psychiatric hospital for treatment of her severe emotional disorders. Dr. Pliska gave the Petitioner a letter dated June 28, 1984 which specified that Susan needed a residential placement at a psychiatric hospital with an in-house education program. On June 18, 1984 the Petitioner wrote to Mr. Twain Tharp, Instructional Officer, Special Education Department, Northeast I.S.D. The Petitioner's letter with Dr. Pliska's letter dated June 18, 1984 attached to it stated that he considered placement of Susan at Center School to be unsuitable and asked Northeast I.S.D. to pay for residential placement for Susan at a pychiatric hospital. Mr. Tharp wrote the Petitioner on June 28, 1984 and stated that Northeast I.S.D. will not pay for a residential placement for Susan because it considered her placement at Center School to be suitable.

On July 5, 1984 the Petitioner submitted a formal written request to the Commissioner of Education of the Texas Education Agency to request a due process hearing before an impartial hearing officer to challenge the Northeast I.S.D.'s refusal to provide his daughter Susan with a residential placement. The Petitioner attached to this written request a copy of Dr. Pliska's letter dated

June 28, 1984 in which he stated that Susan needed a residential school placement.

The Texas Education Agency appointed Mr. Lucius D. Bunton as the impartial due process Hearing Officer. The Texas Education Agency did not hold the due process hearing until October 4, 1984.

The Petitioner at the impartial due process hearing presented testimony of two medical professionals who had treated Susan: Dr. Steven R. Pliska, M.D., Child Psychiatrist, and Dr. Betty Lou Schroeder, PhD., Child Psychologist. The testimony of both of these medical professionals supported residential placement of Susan. Northeast I.S.D. presented testimony from the Principal and Counselor of Center School and two officials from this School District Central Office. The testimony of these four individuals supported a continuation of placement of Susan at Center School.

Mr. Bunton, Hearing Officer, did not reach a decision at the conclusion of the due process hearing. Mr. Bunton stated that the due process hearing minutes would be transcribed, a copy of the minutes would be sent to each party, and each party could submit written comments. Then he would issue his decision.

The attorney for the Northeast I.S.D. filed his (word added by the Petitioner for clarity. Proposed.) Findings of fact brief on November 1, 1984. This brief cited several court reporter citations to oppose a residential placement and also cited Vernon's Texas Statutes Annotated, Education Code, § 21.506(a)(1)-(3) to preclude the granting of a residential placement. This statute which became effective on September 1, 1984 specified a cost constraint

criterion as justification to prevent the granting of residential placements. Mr. Bunton, the Hearing Officer, issued his written negative decision on November 26, 1984.

Plaintiff's Complaint I.

On May 6, 1985 the Plaintiff filed a complaint titled Susan R. M., by her next friend, Charles L. M., vs. Northeast I.S.D., a subdivision of the Texas Education Agency, Defendants, at the Federal District Court, Austin, TX. Docket No. A-85-CA-270 was assigned to this complaint. This complaint sought redress of violations of rights pursuant to 29 U.S.C. § 794, 20 U.S.C. § 1401 et seq. (The Education of All Handicapped Children Act of 1975) (EAHCA), 42 U.S.C. § 1983, the Federal Supremacy Doctrine of Article VI and the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution. The relief sought in this complaint was for the Federal Supremacy Doctrine of Article VI of the U. S. Constitution to override Vernon's Texas Statutes Annotated, Education Code, § 21.506(a)(1)-(3) as a cost constraint with respect to a school district providing a residential school placement for a special education student and a court award of placement of the plaintiff's daughter Susan at the Brown Schools Psychiatric Hospital, San Marcos, TX, until Susan graduated from high school or became age 21. This complaint was assigned to the docket of District Judge James T. Nowlin. On June 5, 1985 the Plaintiff filed a rebuttal brief of the Defendant Northeast I.S.D. attorney's brief of (proposed) findings of fact to the Hearing Officer dated November 1, 1984 and

brief on legal precedents supporting residential placement. This brief rebuts the court reporter citations used in this Defendant's brief. This brief also cited ten court reporter citations from states other than Texas where a residential placement was made for a special education student who possessed a severe learning disability and/or severe emotional disorder. The Plaintiff's daughter Susan possessed both of these Special Education handicapping conditions. The application of this law principle is that both Defendants by refusing to make a residential placement for these handicapping conditions are violating the equal protection of the law principle upon states which is specified by the Fourteenth Amendment of the U. S. Constitution. On April 1, 1986 District Judge Nowlin granted the motion of the Defendant Northeast I.S.D. to transfer venue from Federal District Court, Austin, TX, to Federal District Court, San Antonio, TX.

Federal District Court, San Antonio, TX, assigned Docket No. SA-86-CA-590 to this complaint. This complaint was assigned to the docket of District Judge H. F. Garcia.

The emotional disorder of the Plaintiff's daughter worsened. Susan had to be hospitalized at the adolescent psychiatric ward of the Park North Hospital, San Antonio, TX, from June 28, 1985 until January 7, 1986. Some but not all of the cost of this hospital care was paid for by the Plaintiff's group hospitalization carrier, Blue Cross-Blue Shield of Texas. The Administrator of Park North Hospital removed Susan from this hospital on January 7, 1986 and placed her in the Bridge, an emergency care shelter for adolescents. This hospital Administrator took this action after he determined the maximum amount of

the cost of hospital care that the Plaintiff's group hospitalization carrier would pay. The Plaintiff's daughter Susan still needed more residential psychiatric hospital care. The Texas Department of Human Services informed the Plaintiff that it would arrange for public psychiatric hospital care for his daughter Susan if he would let this public agency become Susan's Managing Conservator by state court order. This state court order of Managing Conservatorship occurred on February 12, 1986. The Texas Department of Human Services placed the Plaintiff's daughter Susan at the Waco, Texas Center for Youth from May 13, 1986 until November 19, 1986. On November 19, 1986 the Texas Department of Human Services transferred Susan from the Waco, Texas Center for Youth to the San Antonio, Texas State Hospital. This facility released Susan some time in September, 1987. The Managing Conservatorship of the Texas Department of Human Services terminated by state court order on Susan's eighteenth birthday which occurred on August 18, 1987.

The Counsel for each Defendant learned of the state court order of Managing Conservatorship for the Plaintiff's daughter Susan which occurred on February 12, 1986. Counsel for each Defendant filed separate motions for dismissal of this complaint on the grounds that Susan was no longer a resident of the Defendant Northeast I.S.D. and the Plaintiff, since February 12, 1986, the date of the state court order of the Managing Conservatorship of the Texas Department of Human Services, and the Plaintiff lacks standing to pursue this legal action. On December 2, 1986 District Judge Garcia granted the two

Defendants' motions to dismiss. The Court order of Judgment which was issued on December 9, 1986 states that the cause was dismissed without prejudice. The Plaintiff, due to his legal inexperience, did not submit an amended complaint for the hospital costs incurred before the date of the Managing Conservatorship or sought relief from the Court Order of Judgment dated December 9, 1986 in order to argue his loss of standing on February 12, 1986 before the Trial Court.

Appellant's Formal Appeal I.

The Appellant appealed District Judge Garcia's decision dated December 9, 1986 to the Fifth Circuit. Docket No. 86-5506 was assigned to this formal appeal.

The Fifth Circuit on June 8, 1987 affirmed the District Court decision. The Fifth Circuit decision is reported at 818 F.2d 455 (5th Cir. 1987). This Fifth Circuit decision affirmed the judgment of the District Court for the reason that the Plaintiff lacked standing after February 12, 1986. Further, the Fifth Circuit held that (i) Rule 17(c) of the Fed.R.C.P. permits the appointment of a parent as next friend when the infant's legal representative has interests which may conflict with those of the infant, (ii) Rule 17(c) permits a federal court to appoint a next friend when the infant's legal representative is unable or refuses to act, (iii) nothing in the federal rules authorizes the parent of a child for whom a legal representative has been appointed to file an action without obtaining court authority to do so, and (iv) a legal guardian can be appointed for Susan after she reaches her age of majority if a state court finds her incompetent.

This Fifth Circuit decision at 818 F.2d 458 contains the following guidance for the Plaintiff to file a subsequent legal action in the District Court. "[4] Had Charles L. M. properly asserted this claim, (i.e., the cost for six months of private hospitalization for Susan in San Antonio, TX before the Managing Conservator was appointed). However, even though he lost standing when the Texas Department of Human Services became Managing Conservator, he would still have the right to seek damages alleging from the failure of Northeast I.S.D. to provide residential placement **before** the appointment of the Managing Conservator. Because he did not plead this claim in the Trial Court, we do not consider it on appeal. Our refusal to do so is without prejudice to his seeking leave from the District Court to amend his complaint or the filing of a separate suit."

The Appellant argued standing before the Fifth Circuit. The Fifth Circuit did not consider the Appellant's arguments on standing since he had not argued standing before the District Court.

Plaintiff's Amended Complaint I.

The Plaintiff followed the guidance of the Fifth Circuit at 818 F.2d 458 and filed the following pleadings with the Trial Court for Docket No. SA-86-CA-590 on July 9, 1987: a motion for leave of the court to represent his daughter as next friend, Plaintiff's motion for leave to amend complaint and Plaintiff's motion to vacate judgment. District Judge Garcia's Order dated August 5, 1987 denied all of these pleadings.

Plaintiff's Complaint II.

On November 12, 1987 the Plaintiff filed a second complaint at the Federal District Court, San Antonio, TX, to supersede his previously dismissed complaint. Docket No. SA-87-CA-1467 was assigned to this complaint. The real party in interest of this legal action was the Plaintiff's daughter Susan. This complaint sought redress of violations of rights pursuant to 29 U.S.C. § 794, 20 U.S.C. § 1401 et seq. (EAHCA), the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Federal Supremacy Doctrine Article VI of the U. S. Constitution. The relief sought was injunctive relief to stop the many Defendant bad faith acts to prevent providing for residential placements for severely handicapped special education children; reimbursement for the total cost incurred for Susan's hospitalization at the adolescent psychiatric ward of the Park North Hospital, San Antonio, TX, from June 28, 1985 to January 7, 1986, $65,738.16; reimbursement for Susan's hospitalization at the Waco, Texas Center for Youth from May 13, 1986 until November 19, 1986, $27,968; reimbursement for Susan's hospitalization at the San Antonio, Texas State Hospital from November 19, 1986 until August 18, 1987, $35,332; reimbursement to the Plaintiff for $695 child support which he paid to the Texas Department of Human Services during the time of its Managing Conservatorship of Susan from February 12, 1986 until August 18, 1987; payment of the Plaintiff's Pro Se legal costs as the prevailing party; damages under state statutes, $300,000 against Northeast I.S.D. and $500,000 against Texas Education Agency for injuries caused to Susan due to negligence; declare the

Texas cost constraint statute which precludes making residential school placements to be null and void under the Federal Supremacy Doctrine and rule that the Defendant Northeast I.S.D. had not considered the uniqueness of Susan's special education handicapping condition in their preparation of her Individual Educational Plans. This complaint was assigned to the docket of visiting District Judge Lucius D. Bunton and subsequently to the newly appointed District Judge Emilio M. Garza. On August 15, 1988 District Judge Garza granted both Defendants' motions to dismiss. The Plaintiff had served his complaint upon the attorneys for each Defendant. Counsel for each Defendant argued that the Plaintiff's complaint had not been served pursuant to Rule 4(d)(6) of the Fed.R.C.P. The Plaintiff filed a motion to reconsider which was denied. The Plaintiff filed a second motion to reconsider which was denied on October 3, 1988.

Appellant's Formal Appeal II.

The Appellant appealed District Judge Garza's Order dated August 15, 1988 which granted both Defendants' motions to dismiss and the Orders dated September 2, 1988 and October 3, 1988 which denied the Plaintiff's two motions for reconsideration to the fifth Circuit. Docket No. 88-5617 was assigned to this formal appeal.

The Fifth Circuit dismissed the Appellant's appeal on October 5, 1989. The Fifth Circuit held that the Plaintiff's notice of appeal which he filed on October 12, 1988 was untimely filed and the Fifth Circuit was without jurisdiction to entertain the Appellant's formal appeal. This decision is tantamount to a dismissal without prejudice. This

Fifth Circuit decision is reported at 884 F.2d 869 (5th Cir. 1989).

Plaintiff's Complaint III.

On October 23, 1989 the Plaintiff filed a third complaint at the Federal District Court, San Antonio, TX, to supersede his two previously dismissed complaints. Docket No. SA-89-CA-1497 was assigned to this complaint. This complaint was assigned to the docket of District Judge H. F. Garcia. This complaint sought redress and remedies the same as the previously dismissed complaint docket No. SA-87-CA-1497. This complaint included the significant coordinate legal argument based upon *Erie R. Co. v. Fritsch*, 72 F. 2d 766, 767 (3rd Cir. 1934), cert. denied, 55 S. Ct. 213, 293 U.S. 620, 79 L.Ed. 768. "Where a suit is begun by an infant and . . . If Infancy does not continue; and the suit may go on as If properly begun. . . . That being the law . . . " This law principle permits a legal action filed on behalf of a minor to be continued after the minor reaches the age of majority. The plaintiff argued before the Trial Court that the Court's decision on December 9, 1986 for docket No. SA-88-CA-590 on standing Affirmed by the Fifth Circuit at 818 F.2d 455 was not an absolute bar to his filing a subsequent legal action. District Judge Garcia assigned this complaint to Magistrate John W. Primomo to rule on pretrial matters. On December 14, 1990 the plaintiff filed a supplemental complaint to delete the $300,000 pecuniary damages due to negligence which applied to the Defendant Northeast I.S.D. as an incorrect claim. On May 16, 1991 Magistrate Primomo issued his Memorandum and

Recommendations to dismiss this complaint for the following reasons: (1) the plaintiff's claims are barred by res judicata; (2) the plaintiff lacks standing to bring a suit on behalf of his adult daughter Susan and (3) the Plaintiff's claims are barred by the applicable state statute of limitations with a specified suspense date of February 12, 1986. The plaintiff appealed Magistrate Primomo's Recommendations to District Judge Garcia on May 28, 1991. On April 2, 1992 District Judge Garcia issued an Order which adopted Magistrate Primomo's Recommendations dated May 16, 1991 and dismissed the plaintiff's complaint pursuant to Rule 12(b)(6) of the Fed.R.Civ.P.

Appellant's formal appeal III.

The Appellant appealed District Judge Garcia's decision dated April 2, 1992 to the Fifth Circuit. Docket No. 92-5576 was assigned to this formal appeal. The Appellant filed his formal appeal brief and record excerpts on June 16, 1992. The Appellant ascertained that through inadvertence his formal appeal brief had omitted legal arguments which pertain to standing. On August 15, 1992 the Appellant filed his motion for leave to file a supplemental brief on standing. The Fifth Circuit Order dated June 4, 1993 denied this motion. The Appellant filed three different letters of supplemental citations on standing pursuant to Rule 28(j) of the Fed.R.App.P. These citations which pertain to standing were not considered by the Fifth Circuit. The Fifth Circuit in a Memorandum Order dated June 4, 1993 Affirmed the judgment of the District Court. This Fifth Circuit Order held that the issue of res judicata did not apply to the first two dismissals of the plaintiff's complaints by the Trial Court.

District Judge Garcia conditioned his decision to dismiss civil action SA-89-CA-1497 upon his original dismissal on December 9, 1986 of civil action SA-86-CA-590 which was Affirmed by the Fifth Circuit in its decision on June 8, 1987 which is reported at 818 F.2d 455. That Fifth Circuit decision at pages 458-459 includes dictum which the Appellant considered to be inapplicable. The Appellant's formal appeal brief offered rebuttal arguments to specify that (i) a parent may act as next friend when the infant's legal representative has interests which conflict with those of the infant or refuses to act, (ii) the appointment of next friend under the provisions of Rule 17(c) of the Fed.R.Civ.P. is permissive and it is not mandatory as stated by the Fifth Circuit and (iii) a next friend is permitted to represent a person in a legal action if that person is not incompetent but because of weakness of mind is unable to prosecute one's own legal action.

The Appellant filed his petition for Rehearing on June 17, 1993. This petition for Rehearing included the following matters.

a. The Appellant stated in a background information paragraph that he possesses no formal legal training and he has made many good faith procedural errors in the prosecution of legal actions on behalf of his daughter Susan. While civil action SA-89-CA-1497 was pending before the Trial Court the Plaintiff conferred with four different attorneys who each declined to take the Plaintiff's legal action.

b. The Appellant made legal arguments to rebut his loss of standing.

c. The Appellant repeated his arguments which were in his formal appeal brief which rebutted the Fifth Circuit's dictum statements which are reported at 818 F.2d. 458, 459.

d. The Appellant cited *Cox v. McDonald-Douglas Corp.*, 665 F.2d 566, 572 (5th Cir. 1982) for the application of the Texas statute of limitations for a minor. This decision held that the Texas two-year statute of limitations does not run during the period of a Plaintiff's minority. The Plaintiff has until two years after reaching the age of majority within which to bring the legal action. The Appellant's daughter Susan became age 18 on August 18, 1987. The Appellant added the following averment to the Fifth Circuit *Cox* decision. Vernon's Texas Codes Annotated, Civil Practice and Remedies Code § 16.001 permits a minor who is under a legal disability when the cause of action accrues to exclude the time of the legal disability from the statute of limitations. The Appellant's daughter Susan was hospitalized at Park North Hospital, San Antonio, TX, from June 28, 1985 to January 7, 1986 which is a period of 193 days. The Texas statute of limitations started on Susan's eighteenth birthday and ended on August 18, 1989. A 193 day exclusion for Susan's legal disability, i.e., her hospitalization at the Park North Hospital, adjustment is added to this date to exclude this period of legal disability. Therefore, the adjusted statute of limitations date is February 27, 1990. The Plaintiff filed civil action SA-89-CA-1497 on October 23, 1989 which is prior to this adjusted statute of limitations date.

e. The Fifth Circuit erred with respect to the subject matter of the Plaintiff's complaint citation of *Erie R. Co.* the subject matter cited by the Fifth Circuit for

this decision was not advanced in the Trial Court by counsel for either Defendant. The failure of each Defendant to raise this subject as a defense in the Trial Court means that the Fifth Circuit cannot consider this subject on appeal.

f. A departure by the Court from its settled course of procedure is an exception which permits a judgment to be reversed.

g. The Appellant cited *U.S. v. Kimbell Foods, Inc.*, 99 S.Ct. 1448, 1458, 440 U.S. 715, 59 L.Ed.2d 711 (1979) on remand *U.S. v. Crittenden*, 600 F.2d 478 (5th Cir. 1979). This U.S. Supreme Court decision held that if the application of state law to resolve controversies directly affecting the operations of federal programs would frustrate specific objects of the federal programs courts must fashion special rules solicitous of those federal interests.

h. The Appellant submitted an alternative claim for relief as follows. Upon remand to the Trial Court the Plaintiff has standing to prosecute for the reimbursement of $65,738.16 for the cost of his daughter Susan's psychiatric hospitalization at Park North Hospital, San Antonio, TX from June 28, 1985 to January 7, 1986. This psychiatric hospitalization occurred before the plaintiff lost standing to the TX Department of Human Services on February 12, 1986.

The Fifth Circuit denied the Appellant's petition for Rehearing on July 15, 1993.

REASONS FOR GRANTING THE WRIT

I.

Loss of standing does not mean the petitioner has lost standing to sue on behalf of his daughter Susan

The Fifth Circuit in its denial of the Appellant's Petition for Rehearing on July 15, 1993 misconstrued his loss of standing on February 12, 1988 to mean that he has lost standing to sue thereafter. The petitioner argues that loss of standing and standing to sue are two separate legal issues. The petitioner bases this argument upon the citation of *Sierra Club v. Morton,* 92 S.Ct. 1361, 1364, 405 U.S. 727, 31 L.Ed.2d 636 (1972). "[1, 4] . . . Whether a party has a sufficient stake in an otherwise justifiable controversy to obtain justifiable resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 633, as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' *Flast v. Cohen,* 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947. . . . " Therefore, based upon *Sierra Club,* supra, the Petitioner submits that his loss of standing on February 12, 1986 does not preclude his standing to sue thereafter on behalf of his daughter Susan.

The Appellant's petition for Rehearing which he filed with the Fifth Circuit on June 17, 1993 at pages 2-4 cited

the following complementary legal arguments on standing presented supra. The Appellant cited *Singleton v. Wulff*, 96 S.Ct. 2868, 2877, 428 U.S. 108, 49 L.Ed.2d 811 (1978). "[7, 8] . . . there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below. . . . or where 'injustice might otherwise result.' *Hormel v. Helvering*, 312 U.S. at 557, 61 S.Ct. at 728.[8] (Footnote 8 omitted.) . . . injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard." The Appellant also cited *Hill v. City of Houston*, 764 F.2d 1156 (5th Cir. 1984) for the law principle of standing. This decision states that standing involves question whether plaintiff is a proper party to request an adjudication of a particular issue; it is a separate inquiry from whether that party should prevail and, in fact it is not proper for the court to consider the likelihood of success on the merits in determining the plaintiff's standing to proceed.

II.

The Fifth Circuit has used the wrong date to commence the Texas statute of limitations for a legal action filed on behalf of a minor

The Appellant argued in his petition for Rehearing filed on June 17, 1993 that in a legal action filed on behalf of a minor the Texas statute of limitations does not run during the period of a Plaintiff's minority. This argument was based upon the citation of *Cox v. McDonald-Douglas Corp.*, 665 F.2d. 566, 572 (5th Cir. 1982) which applied the Texas two-year statute of limitations to a legal action on

behalf of a minor. The Fifth Circuit denied the Appellant's petition for rehearing on July 15, 1993 and held to its decision on June 4, 1993 which applied the Texas two-year statute of limitations to the date of February 12, 1986. This date is the date the TX Department of Human Services became Susan's Managing Conservator and the plaintiff lost standing. The petitioner argues that under the right to sue principle which he argued in I. supra that the date the Texas two-year statute of limitations for this legal action should commence on Susan's eighteenth birthday, August 18, 1987, and not the date on which he lost standing on February 12, 1986. The petitioner amplifies his argument on this issue, *Cox*, supra, with the following citations. The petitioner cites *Landreth By and Through Ore v. U. S.*, 850 F. 2d 532, 534 (9th Cir. 1988), cert. denied 109 S.Ct. 866, 488 U.S. 1042, 102 L.Ed.2d 990 (1989). "[2] . . . The fact of minority does not toll the statute (Added by petitioner for clarity. of limitations). *Brown v. United States*, 353 F.2d 578, 579 (9th Cir. 1965) . . . . " The Appellant cites *Shook By and Through Shook v. Gaston County Bd. of Educ.*, 882 F.2d 119, 121 (4th Cir. 1989) cert. denied 110 S.Ct. 1166, 107 L.Ed.2d 1069 (1990). "[1] The three-year statute of limitations in North Carolina . . . allows a person who is within the age of 18 at the time the cause of action accrues to bring suit within three years after removal of the disability, in this case upon reaching the age of majority. Thus, Karen's cause of action is not time barred after obtaining her majority . . . " Further, the *Shook* legal action was a claim for reimbursement for the cost of hospitalization of a minor which was paid for by the group hospitalization insurance carrier in

the name of the minor's father. This legal action was filed pursuant to the EAHCA. See *Shook* synopsis at page 119.

The Appellant cites Vernon's Texas Codes Annotated, Civil Practice and Remedies Code, § 16.001 Effect of Disability which became effective September 1, 1987.

"(a) For the purposes of this subchapter, a person is under a legal disability if the person is:

(1) younger than 18 years of age, regardless of whether that person is married; or

(2) of unsound mind.

(b) If a person entitled to bring a personal action is under a legal disability when the cause of action accrues, the time of the disability is not included in a limitations period. . . . "

The petitioner summarizes the claim made in his petition for Rehearing to the Fifth Circuit on June 17, 1993 as follows.

(i) Susan's eighteenth birthday: August 18, 1987.

(ii) Texas two-year statute of limitations date before adjustment: August 18, 1989.

(iii) Add 193 day adjustment for Susan's hospitalization at Park North Hospital, San Antonio, TX, pursuant to Texas Civil Practice and Remedies Code § 16.001(b). The adjustment of 193 days added to August 18, 1989 becomes February 27, 1990.

(iv) Adjusted Texas statute of limitations date to exclude Susan's legal disability as a minor before the

petitioner's loss of standing on February 12, 1986: February 27, 1990.

The plaintiff filed his complaint for civil action SA-89-CA1497 on October 23, 1989. Therefore, based upon the above legal arguments, the petitioner concludes that civil action SA-89-CA1497 was timely filed.

III.

The Fifth Circuit decision that written consent of all parties is not required to refer pre-trial matters to the magistrate judge conflicts with decisions of other Courts of Appeal

The Fifth Circuit held (at Appendix A page 7) that obtaining written consent of the parties was not required for the Trial Court to send the case to the magistrate judge pursuant to 28 U.S.C. § 636(b)(1). The petitioner cites from 28 U.S.C. § 636(c).

"(c) notwithstanding any provision of law to the contrary –

(1) upon the consent of the parties, a full-time United States magistrate . . . may conduct any or all proceedings in a jury or nonjury civil matter. . . . Upon the consent of the parties, pursuant to their specific written request. . . . "

The Appellant in his formal appeal brief filed June 16, 1992 at Page 9 cited *Clark v. Poulton*, 914 F.2d 1426, 1431 (10th Cir. 1990) and the cases cited therein for the law principle that written consent is required from all parties in order for a Federal magistrate to rule on pre-trial matters. Upon further legal research the Petitioner

found the same requirement for written consent for all parties specified at *Archie v. Christian*, 768 F.2d 726, 728 (5th Cir. 1086) rehearing en banc 808 F.2d 1182 (5th Cir. 1987).

IV.

The Fifth Circuit decision conflicts with U. S. Supreme Court decisions for granting equitable relief and permitting an exception to a State claim for Eleventh Amendment sovereign immunity

The Fifth Circuit held (at Appendix A page 7) that "equitable considerations do not apply notwithstanding the numerous legal obstacles in his path." The Fifth Circuit stated that the Appellant misunderstands the nature of equity and cited *United States v. Coastal Refining & Marketing, Inc.*, 911 F.2d 1036, 1043 (5th Cir. 1990). The Petitioner cites the definition for equity which is stated at Webster's New World Dictionary of the American Language College Edition at page 491.

". . . . 4. in **law,**

a) resort to general principles of fairness and justice whenever existing law is inadequate.

b) a system of rules and doctrines, as in the United States, supplementing common and statute law and superseding such law when it proves inadequate for just settlement.

c) an equitable right or claim.

d) an equity of redemption."

The Appellant's formal appeal brief filed on June 16, 1992 at Page 37 cited *Bigalow v. RKO Pictures*, 327 U.S.

251, 265, 66 S.Ct. 574, 90 L.Ed. 642 (1946) as the basis of the Court to give equitable relief. The Fifth Circuit *United States v. Coastal Refining & Marketing, Inc.*, decision and its refusal to grant equitable relief to the Appellant conflict with the Supreme Court *Bigalow* decision.

The Appellant's pleading filed with the Fifth Circuit on September 1, 1992 argued that there is an exception to the State of Texas claiming Eleventh Amendment sovereign immunity to bar this formal appeal. This exception consists of the following legal argument. Federal courts have preserved for themselves the power to enjoin state officials to conform their conduct to the requirements of Federal law, *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) which in turn cited two other U. S. Supreme Court decisions. The Plaintiff's complaint filed with the Trial Court on October 23, 1989 at Page 1 Paragraph 1. and Pages 42-44 Paragraph Nos. 82. and 83. comport with this exception to the State of Texas claim of Eleventh Amendment sovereign immunity. The Fifth Circuit Order dated June 4, 1993 (Appendix A Page 12) denied the Appellant's motion to quash the Texas Education Agency brief which raised this claim.

V.

Certiorari should be granted to resolve conflicts between the Fifth Circuit decision and U. S. Supreme Court decisions

The Fifth Circuit decision on June 4, 1993 and its denial of the Appellant's petition for Rehearing on July 15, 1993 conflict with the U. S. Supreme Court decisions of *U. S. v. Kimbell Foods, Bigalow v. RKO Pictures, Sierra*

Club v. Morton and *Singleton v. Wulff*, and *ex parte Young*, supra.

" . . . An inferior court is bound by the mandate of the superior one, and must carry its directions into execution." *Sibbold v. United States*, 37 U.S. (12 Pet.) 488, 9 L.Ed. 1167 (1838), *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948).

Federal District Courts and Courts of Appeal are bound to adhere to the controlling decisions of the U. S. Supreme Court. *Hutto v. Davis*, 454 U.S. 370, 375, 102 S.Ct. 703, 705-706, 70 L.Ed.2d 566 (1982) and *Stell v. Savannah-Chatham County Board of Education*, 333 F.2d 55, 61 (5th Cir. 1984), cert. denied, 379 U.S. 933, 85 S.Ct. 332, 13 L.Ed.2d 344 (1984).

Apparent conflict between decision and Supreme Court's holdings in another case impelled that court to grant certiorari. *Heflin v. U. S.*, 79 S.Ct. 451, 452, 358 U.S. 415, 3 L.Ed. 2d 407 (1959).

VI.

Certiorari should be granted to resolve conflicts of decisions between different U.S. Courts of Appeals

The Fifth Circuit decision on June 4, 1993 and its denial of the Appellant's petition for Rehearing on July 15, 1993 conflict with the other U. S. Courts of Appeals decisions of *Landreth, Shook, Clark* and the cases cited therein.

United States Supreme Court granted certiorari where there was an alleged conflict between the determination made by the Courts of Appeals and earlier decision of the Supreme Court. *Pennsylvania R. Co. v. O'Rouke*, 73 S.Ct. 302, 303, 344 U.S. 334, 97 L. Ed. 1347 (1953).

Because of inconsistencies in holdings of Second and District of Columbia Circuits, United States Supreme Court granted certiorari. *Nat. Ass'n of Greeting Card Pub. v. U. S. Post. Ser.*, 103 S.Ct. 2717, 2724-2725, 462 U.S. 810, 77 L.Ed. 2d 195 (1983), on remand *Newsweek, Inc. v. U. S. Postal Service*, 716 F.2d 993 (2nd Cir. 1983).

Conflict of decision with that rendered by court in another circuit in similar matter impelled Supreme Court to grant certiorari for review thereof. *Rogers v. Quan*, 78 S.Ct. 1076, 357 U.S. 193, 2 L.Ed. 2d 1252 (1958).

Where a question was important and recurring, Supreme Court would grant certiorari to resolve it. *Glus v. Brooklyn Eastern Dist. Terminal*, 79 S.Ct. 760, 761, 762, 359 U.S. 231, 3 L.Ed.2d 770 (1951).

A showing of plain error is essential to justify Supreme Court in overruling lower federal courts in their application of local law. *Francis v. Southern Pac. Co.*, 68 S.Ct. 611, 612, 333 U.S. 445, 92 L.Ed. 798 (1948).

Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed. *Price v. Johnson*, 68 S.Ct. 1049, 1063, 344 U.S. 266, 92 L.Ed. 1356 (1948).

"[3] . . . It is a permissible exercise of our discretion to undertake review of an important issue decided by a

federal court[5] (Footnote 5 omitted.) where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to a recent proceeding upon which the lower courts relied upon for their resolution of the issue, and did not concede in the current case the correctness of that precedent. . . . " *U. S. v. Williams*, 112 S.Ct. 1735, 1740, 1741 (1992).

The Supreme Court has power to do justice as the case requires. 28 U.S.C.A. § 2106. *Tinker v. U. S.*, 73 S.Ct. 911, 913, 345 U. S. 565, 97 L.Ed. 1250 (1953).

CONCLUSION

For the reasons set forth above, the petitioner respectfully prays that this Writ of Certiorari be granted by this Court.

Respectfully submitted,

CHARLES L. M.
Petitioner Pro Se
355 Pinewood Lane
San Antonio, Texas 78216
(210) 828-1913

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5576
Summary Calendar

CHARLES L. M., on behalf of his daughter, Susan R. M.,

Plaintiff-Appellant,

v.

NORTHEAST INDEPENDENT SCHOOL DISTRICT, ET AL.

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-89-CA-1497)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

This is the third time that this litigation has been before us. *See Charles L.M. v. Northeast Independent School District*, 884 F.2d 869 (5th Cir. 1989); *Susan R.M. v. Northeast Independent School District*, 818 F.2d 455 (5th Cir. 1987). On this third appeal, the court is barraged with

* local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

various pleadings and motions filed by the plaintiff-appellant, Charles L. M., acting as next friend of his minor daughter, Susan R. M. We are also presented with a motion requesting sanctions against Charles L. M. filed by one of the appellees. We find that every argument made by the appellant is meritless but, in consideration of his *pro se* status, decline to impose sanctions.

I.

In 1985, Charles L.M., acting as next friend of his minor daughter, Susan R.M., brought suit against Northeast Independent School District (NEISD) and the Texas Education Agency (TEA) "claiming that the Education of All Handicapped Children Act (EAHCA) required [the defendants] to place his child in a residential psychiatric hospital with an in-house education program." *Susan R. M.*, 818 F.2d at 457. This court affirmed the district court's determination that Charles L. M. did not have standing to bring the suit because Charles L. M. had previously obtained from a Texas state court the appointment of the State of Texas as his daughter's managing conservator. *Id.* The state court also appointed an attorney ad litem. *Id.* This Court left open a number of issues, including: i) the underlying EAHCA claim, which could be prosecuted by Susan through her attorney ad litem, ii) Charles L. M.'s right to recover possible damages sustained before Susan's managing conservatorship, and iii) Charles L. M.'s possible standing if – after Susan turns eighteen and, thus, loses her court-appointed managing conservatorship – he can show her to be incompetent. *Id.* at 458-59.

Susan turned eighteen on August 18, 1987. Shortly thereafter, Charles L. M. brought a second suit in his daughter's behalf. The district court dismissed for insufficient service and this court dismissed for untimely notice of appeal. *Charles L. M.*, 884 F.2d 869, (5th Cir. 1989). In October 1989, Charles L. M. once again filed suit on behalf of his daughter. In the complaint, he alleged that the defendants violated EAHCA and the Equal Protection Clause, violated state tort law, and requested that various Texas education statutes should be declared null and void to the extent that they conflicted with the EAHCA. Charles L. M. asked for damages, a declaratory judgment, and injunctive relief. He also asked for the district to restore his legal control over Susan from the time of the state managing conservatorship until her eighteenth birthday in 1987.

NEISD answered by asserting the defenses of mootness, Charles L. M.'s lack of standing, the running of the statute of limitations, res judicata, collateral estoppel, and Eleventh Amendment sovereign immunity. TEA filed motions for dismissal and for sanctions. The district court referred the case to the magistrate judge for pre-trial matters. The magistrate judge ruled on many of the motions, including plaintiff's motions for default judgment. The magistrate judge recommended that the case be dismissed, basing his ruling on a finding of res judicata, Charles L. M.'s lack of standing, and the running of the statute of limitations. The magistrate also recommended sanctions against Charles L. M. Charles L. M. filed timely objections that disputed his lack of standing, the application of res judicata, the application of Texas'

two-year statute of limitations for this suit, and the propriety of sanctions. Among his many motions, Charles L. M. filed a motion for permission to file supplemental pleadings, which the district court treated as untimely objections to the magistrate report.

The district court, after *de novo* review, adopted the portions of the magistrate report recommending dismissal but declined to impose sanctions. After timely notice of appeal was filed, the parties filed various motions in this Court.

II.

i) The Merits

A. The District Court's Application of the Res Judicata Doctrine

In attacking the district court's order of dismissal, Charles L. M. argues that the district court's ruling that his claims were res judicata was inappropriate. In the first suit, this court affirmed the district court's dismissal on standing grounds. *Susan R. M.*, 818 F.2d at 457. Standing is viewed as a threshold jurisdictional issue and, therefore, the first suit was not a final decision on the merits. We agree that it thus would not support a dismissal on the basis of res judicata. *See Gregory v. Mitchell*, 634 F.2d 205, 206-07 (5th Cir. 1981).

B. Does Charles L. M. Have Standing?

As we observed in our prior decision, Charles L. M., by consenting to Susan's managing conservatorship, relinquished the right to assert any claims in her behalf

while she remained a minor. *Susan R. M.*, 818 F.2d at 458. We also observed that, *after* Susan turned eighteen, Charles L. M. would have no standing unless he showed that Susan had been declared mentally incompetent to bring her own lawsuit. *See id.* at 458-59; Fed. R. Civ. P. 17(c). Considering that Susan is now twenty-two years old and has not been declared mentally incompetent, we agree with the lower court that Charles L.M. has no standing to assert any claims on his daughter's behalf that arose after her managing conservator was appointed.

C. Claims That Arose Before the Appointment of Susan R. M.'s Managing Conservator

Although his pleadings are unclear on this point, we will assume that Charles L. M. also is claiming that he is entitled to recover damages for claims that arose *before* the creation of the managing conservatorship. *See Susan R. M.*, 818 F.2d at 458 (leaving the pre-conservatorship claim open). If this is indeed the case, we agree with the lower court that the statute of limitations bars this claim. The conservatorship came into existence in February 1986. *Id.* at 457. This Court uses a two-year statute of limitations for EAHCA actions arising in Texas. *See Scokin v. Texas*, 723, F.2d 432, 438 (5th Cir. 1984). Charles L. M. argues *Scokin* was decided wrongly. We observe that "[i]n this circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding by the [C]ourt en banc or the Supreme Court." *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211 (5th Cir. 1991), *cert. denied*, 113 S.Ct. 191 (1992).

Charles L. M. further argues that Texas law adds two years to the limitation to account for a claim arising during a plaintiff's minority. This makes no difference in this case because, as we previously decided, Charles L. M. does not have standing to assert his adult daughter's claims, even ones that arose while she was a minor.

D. Charles L. M.'s Plea that Susan R. M.'s Conservatorship be Retroactively Invalidated

As noted supra, Charles L. M.'s complaint asked the district court to invalidate the managing conservatorship from 1986 through August 1987, when Susan turned eighteen and her conservatorship ceased. The district court held that such relief was beyond its jurisdictional power. Charles L. M. disagrees and cites *Christopher T. v. San Francisco Unified School Dist.*, 553 F.Supp. 1107, 1120-21 (N.D. Cal. 1982), for the proposition that a federal court can invalidate the state's legal custody of a minor whose parents relinquished their parental rights in order for the child to receive needed educational and psychological care. His reliance on that case is misplaced. *Christopher T.* involved two minors. *Id.* at 1109-10. The court ordered legal custody restored to the minors' parents. *Id.* at 1120-21. Susan is now twenty-two. The state's managing conservatorship ended upon her eighteenth birthday. We are aware of no legal authority that allows a federal court to retroactively invalidate a state court-created managing conservatorship which is no longer in existence, particularly when no federal constitutional basis has been offered for such a drastic intrusion into the traditional province of state courts.

E. Charles L. M.'s Invocation of Equitable Principles.

Charles L. M. argues that "equitable considerations" provide an avenue for his suit's success notwithstanding the numerous legal obstacles in its path. We disagree. Charles L. M. simply misunderstands the nature of equity. *See United States v. Coastal Refining & Marketing, Inc.*, 911 F.2d 1036, 1043 (5th Cir. 1990) ("A court in equity may not do that which the law forbids.").

F. Was the Case Improperly Referred to the Magistrate?

Charles L. M. argues that the district court erred in sending the case to the magistrate judge to rule on pretrial matters without obtaining the consent of the parties. Charles L. M. never objected to the district court's sending the case to a magistrate judge. Therefore, this court review for plain error. *United States v. Paden*, 908 F.2d 1229, 1237 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 710 (1991). We find no plain error. The district court sent the case to the magistrate judge pursuant to 28 U.S.C. § 636(b)(1), a statute which does not require the consent of the parties.

G. Charles L. M.'s Motion for Default Judgment and TEA's Response to the Complaint

Charles L. M. argues that the district court and the magistrate erred in not granting his motion for default judgment. A defendant has twenty days to respond after the service of summons and complaint. *See* FED. R. CIV. P. 6(a), 12(a). NEISD received the summons and complaint on October 26, 1989, and filed its answer on

November 15, 1989. TEA received the summons and complaint on October 27, 1989 and filed its Rule 11 and 12(B)(6) motions on November 16, 1989. That is, both defendants responded on the twentieth day following their respective receipts of the complaint.

Rule 12 allows the defendant to assert the defense of a failure to state a claim upon which relief can be granted as an independent motion in response to a complaint and need not be a part of an answer. *See* FED. R. CIV. P. 12(b). This is precisely what TEA did when it filed its 12(b)(6) motion. Default judgment is improper if a party is defending against suit. *See* FED. R. CIV. P. 55(a). The district court thus did not err in denying the motion for default judgment.[1]

H. Charles L. M.'s Motion to Recuse the Magistrate Judge

Charles L. M. argues that the district court erred in denying his motion to recuse the magistrate judge. After the magistrate judge seat the case back to the district

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[1] Charles L. M. also argues that the district court erred in failing to consider his motion for "judicial notice" of TEA's motion to dismiss as not being a proper answer to the complaint. Charles L. M. brought his motion pursuant to Rule 201(a) of the Federal Rules of Evidence, which governs judicial notice of "adjudicative facts" found in the rule's advisory notes, we believe that what Charles L. M. wanted the district court to notice judicially does not qualify an adjudicative fact. *See id.* Advisory Committee's Notes, subdivision (a). Moreover, Charles L. M. is simply incorrect in his argument that TEA's Rule 12(b)(6) motion to dismiss is not a proper response to a complaint.

court, Charles L. M. filed a motion to have the magistrate recused from the case because this magistrate was the law clerk for the district court judge who presided over Charles L. M.'s first lawsuit in 1986.

The federal judicial recusal statute provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Nothing in Charles L. M's allegation would lead a reasonable person to question the impartiality of this magistrate judge. Moreover, this court imputes a timeliness requirement onto a § 455 request. *See Delesdernier v. Porteries*, 666 F.2d 116, 121-123 (5th Cir.), *cert. denied*, 459 U.S. 839 (1982). Because Charles L. M. filed his motion *after* the magistrate judge made his recommendation and sent the case back to the district court, this court can view the motion as "too tardily made for . . . consider[ation] . . . now." *Id.* at 123 (footnote omitted).

I. Were Proper Findings of Fact Made?

Charles L. M. argues that the district court and the magistrate judge erred in failing to make findings of fact within their orders. He does not identify or specify which orders are allegedly faulty in this respect. The Federal Rules of Civil Procedure provide that "[f]indings of fact and conclusions of law are unnecessary on decisions of" Rule 12 motions. *See* FED. R. CIV. P. 52(a) & (c). This case was dismissed pursuant to a Rule 12 motion. Thus, no findings of fact were required in any event.

J. Did the District Court Err in Failing to Consider Charles L. M.'s "Counterclaim Supplemental Pleadings"?

Charles L. M. argues that the district court erred in refusing to consider in its final order his motions to file "counterclaim supplemental pleadings." The district court treated these motions as untimely objections to the magistrate judge's report and recommendations. "A district court . . . has the discretionary authority to allow a party to file objections after the ten-day period." *Cay v. Estelle*, 789 F.2d 318, 322 (5th Cir. 1986) (citing to FED. R. CIV. P. 6(b)).

Charles L. M.'s motions were brought pursuant to Rule 15(d) of the Federal Rules of Civil Procedure, which governs supplemental pleadings, not objections to a magistrate's proposed findings and conclusions. A district court must freely permit amendments "unless the ends of justice require denial." *James v. Sadler*, 909 F.2d 834, 836 (5th Cir. 1990); *see also* FED. R. CIV. P. 15, Advisory Committee's Notes (1963 amendments).

We believe that any error was harmless because the substance of what Charles L. M. was trying to add to the record would not have made a difference to the result reached by the district court. *See* FED. R. CIV. P. 61 (harmless error). Charles L. M.'s first "counterclaim-supplemental motion" made the argument that this third lawsuit and the second lawsuit were simply amended complaints which relate back to the original complaint filed in the first lawsuit. This argument is frivolous. The second motion argued that a Texas statute provides

Charles L. M.'s daughter a tolling of the statute of limitations for the time she was in a psychiatric hospital. This is irrevelant because, as we previously have held, Charles L. M. does not have standing to assert his daughter's rights.

K. Substitution of Counsel

Charles L. M. argues that Rule 12(a) provides twenty days for an opposing party to respond to a motion and that the district court erred in granting TEA's motion to substitute counsel without affording Charles L. M. twenty days to respond. Charles L. M. also filed a motion to strike TEA's motion under rule 12(f) after the district court granted the motion.

While 12(a) expressly applies to pleadings; a motion to substitute counsel is in no way connected with the pleadings. *See* FED. R. CIV. P. 7(a) & (b), 12(a). Any possible error that the district court might have made by granting TEA's motion would be harmless because Charles L. M.'s substantive rights were not affected. *See* FED. R. CIV. P. 61.

I. *Pro Se* pleadings

Charles L. M. argues that the district court did not construe liberally his *pro se* complaint and motions. He is correct that a court must construe liberally the legal papers of a *pro se* litigant. *See Haines v. Kerner,* 404 U.S. 519, 520 (1972). Our review of the record gives no indication that the district court or the magistrate judge did not afford Charles L. M.'s pleadings the requisite solicitude.

ii) Motions

A. Charles L.M.'s Motion to Quash TEA's Brief

Pending before this Court is Charles L. M.'s motion to quash TEA's brief. In this motion, Charles L. M. argues that, because TEA did not raise the defense of Eleventh Amendment sovereign immunity in the court below, as it does on appeal, TEA is prohibited from raising this issue for the first time in this court. We note that the Supreme Court has held that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974). Therefore, we deny Charles L. M.'s motion.[2]

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[2] Charles L. M.'s related motions to quash NEISD's brief and to compel the clerk of the court to file his motion to quash NEISD's brief have previously been denied. *See Charles L. M. v. Northeast Indep. School Dist.*, No. 92-5576 (5th Cir. Aug. 28, 1992) (one-judge order); *id.* (5th Cir. July 31, 1992) (one-judge order).

Although the Clerk of the Court has twice returned it to Charles L. M. on the ground that it was moot, for purposes of finality we herein deny Charles L. M.'s "Motion to Compel the Court Clerk to File His Previously Filed Pleading." The previously filed pleading" to which Charles L. M. refers was actually his motion to quash NEISD's response to Charles L. M.'s motion to quash NEISD's brief. Charles L. M. filed the most recent motion to quash on the same day that this court denied Charles L. M.'s motion to quash NEISD's brief. Thus, Charles L. M.'s most recent motion to quash was in fact moot and was properly rejected by the Clerk of the Court.

B. Charles L. M.'s Motion to Supplement His Appellate Brief

Also pending before the Court is Charles L.M.'s motion for leave to file a supplemental brief. He contends that a supplemental brief is necessary to rebut appellees' arguments regarding standing. He believes that he has standing to assert his daughter's claims based upon *Eric R.R. Co. v. Fritsch*, 72 F.2d 766, 767 (3rd Cir.), *cert. denied*, 293 U.S. 620 (1934), a case dealing with the appointment of a next friend under New Jersey law. That case is inapposite. We deny Charles L. M.'s motion.

C. Motions for Sanctions

Pending before this Court are NEISD's motion for sanctions against Charles L. M. and Charles L.M.'s motions for sanctions against counsel for NEISD. Charles L. M. argues that NEISD's counsel violated the Texas Rules of Professional Conduct in counsel's response to appellant's motion to file a supplemental brief. Specifically, Charles L. M. claims that NEISD's counsel "misrepresented the law" in his response to Charles L. M.'s appellate motion. We have reviewed all of NEISD's legal papers and disagree with Charles L. M. that counsel misrepresented the law, intentionally or otherwise. We thus deny Charles L. M.'s request for sanctions.

NEISD argues that we should award it sanctions in view of the frivolous nature of Charles L. M.'s most recent appeal in this seemingly never-ending litigation. "An appeal is frivolous if the result is obvious or the arguments of error are wholly without merit." *Coghlan v. Starkey*, 852 F.2d 806, 811 (5th Cir. 1988). Although we

agree that Charles L. M.'s appeal is wholly frivolous, we decline to impose sanctions in view of Charles L. M.'s *pro se* status. *See Clark v. Green*, 814 F.2d 221, 223 (5th Cir. 1987) (noting this court's caution in sanctioning *pro se* litigants). We do note, however, that should Charles L. M. file another frivolous lawsuit or appeal involving the same general subject matter involved in the last three rounds of this litigation, we will not indulge him in any further solicitude regarding sanctions.

III.

For the forgoing reasons, we AFFIRM the judgment of the district court in all respects and DENY every motion filed by Charles L. M. in this court. We also DENY Charles L. M. and NEISD's motions for sanctions.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5576
Summary Calendar

D.C. Docket No. SA-89-CA-1497

CHARLES L.M., on behalf of his daughter Susan R.M.,

Plaintiff-Appellant,

versus

NORTHEAST INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before KING, DAVIS, and WIENER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

June 4, 1993

ISSUED AS MANDATE: July 26, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5576

CHARLES L.M., on behalf of his daughter Susan R.M.,

Plaintiff-Appellant,

versus

NORTHEAST INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(July 15, 1993)

Before KING, DAVIS, and WIENER, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SUSAN R.M., by her next friend, CHARLES L.M.,	§	
Plaintiff,	§	
v.	§	CIVIL NO. SA-89-CA-1497
NORTHEAST INDEPENDENT SCHOOL, DISTRICT and TEXAS CENTRAL EDUCATION AGENCY,	§	
Defendants.	§	

ORDER

On this date came on for consideration by the Court plaintiff's complaint seeking recovery of monetary damages, declaratory and injunctive relief, arising out of defendant Northeast Independent School District's alleged failure to properly provide a residential placement with in-house education program for his daughter, Susan, while she was a student in that school district. Also under consideration by the Court is the May 16, 1991 Memorandum and Recommendation of the United States Magistrate Judge John W. Primomo to which certain objections have been filed by the plaintiff on May 28, 1991.[1]

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[1] *See* docket entry no. 60. plaintiff has also filed several subsequent pleadings that either directly or indirectly challenge the findings and conclusions reached by the Magistrate Judge in his Memorandum and Recommendation. However, because these pleadings were *not* filed within the time frame provided

A review of the record reveals that the Magistrate Judge correctly determined that (1) plaintiff's claims were barred by the doctrine of *res judicata*, (2) plaintiff lacked standing at the time this lawsuit was filed to bring suit on behalf of his then-no-longer-minor daughter, and (3) the applicable statute of limitations barred the claims plaintiff asserts in this lawsuit.

Plaintiff objects to the Magistrate Judge's findings and conclusions that he lacked standing after February 12, 1986 to represent Susan's interests, that the same claims he raises herein were actually litigated and decided on the merits in his first lawsuit filed in this Court, and that the applicable statute of limitations for his claims herein is two years.[2] However, the plaintiff's two previous lawsuits filed in this Court, discussed in detail in the Magistrate Judge's Memorandum and Recommendation, presented this Court with the same basic claims raised by plaintiff's pleadings in this cause.[3] The

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by 28 U.S.C. § 636(b)(1)(C), this Court need not consider these untimely objections.

[2] While plaintiff also takes issue with various other statements, findings, and conclusions contained in the Magistrate Judge's Memorandum and Recommendation, those matters are not determinative of the outcome of this cause and will not be specifically addressed by this Court.

[3] In his objections to the Magistrate Judge's Memorandum and Recommendation plaintiff argues that one of the objects of the present lawsuit was an Order from this Court retroactively setting aside a guardianship order entered by the state courts appointing the Texas Department of Human Services as Susan's legal guardian. However, plaintiff cites to no legal authority granting this Court the authority to act as a quasi-appellate court for such orders and this Court has been unable to locate

Fifth Circuit has expressly held that plaintiff has clearly lacked standing since February 12, 1986 to act as next friend for Susan.[4] Finally, plaintiff filed this lawsuit on October 23, 1989, more than two years after the date the Texas Department of Human Services was appointed as guardian for Susan and, thus, after the expiration of the applicable statute of limitations.[5]

Having conducted an independent review of the record in this cause as required by Title 28 U.S.C. Section 636(b)(1)(C), and having made a *de novo* determination as to those matters specifically objected to, the Court hereby accepts and adopts that portion of the Magistrate Judge's Memorandum and Recommendation recommending that defendants' motions to dismiss be granted.

The Magistrate Judge also recommended that sanctions in the amount of $500 for each defendant be imposed against plaintiff in this cause, pursuant to Rule 11, Fed.R.Civ.P. However, neither defendant has furnished the Court with the type of evidence the Fifth Circuit has recommended to support an award of monetary sanctions under Rule 11.[6] Such an amount would, in all liklihood, prove insufficient to fully compensate the defendants for their legal expenses incurred in connection with this lawsuit. Therefore, the Court believes that

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any authority supporting such an extraordinary exercise of jurisdiction by this Court over such a matter. The Federal courts remain courts of limited jurisdiction.

[4] *See Susan R. M. v. Northeast Independent School District*, 818 F.2d 455, 458 (5th Cir. 1987).

[5] *See Scokin v. State of Texas*, 723 F.2d 432, 438 (5th Cir. 1984).

[6] *See Bogney v. Jones*, 904 F.2d 272, 274-75 (5th Cir. 1990).

the Magistrate Judge's admonition to plaintiff to refrain from continuing to pursue the relief sought herein will suffice for the time being to dissuade him from further harassment of the defendants and that an award of monetary damages is not necessary *at this time.*[7]

It is hereby ORDERED that plaintiff's complaint is DISMISSED WITHOUT PREJUDICE pursuant to Rule 12(b)(6), Fed.R.Civ.P.

SIGNED this 1st day of April, 1992, at San Antonio, Texas.

/S/ H. F. Garcia
H.F. GARCIA
United States District Judge

FILED

April 2, 1992

CHARLES W. VAGNER, Clerk
By AC Deputy

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[7] Further efforts by plaintiff to re-litigate the issues raised herein will most certainly warrant the imposition of monetary sanctions in an amount sufficient to *fully* compensate the defendants for their legal expenses.